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No. 06-1194

In the Supreme Court of the United States

IN RE ALI, PETITIONER

ON PETITION FOR A WRIT OF HABEAS CORPUS

MOTION TO DISMISS

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QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction to consider petitioner's petition for original writ of habeas corpus.

2. Whether, even assuming this Court has jurisdiction to entertain this petition, the petition should be dismissed because petitioner has not exhausted his available remedies in the court of appeals.

3. Whether, assuming jurisdiction, petitioner has satisfied the stringent standard for obtaining mandamus relief from this Court.

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The Solicitor General, on behalf of the United States, respectfully files this motion to dismiss the captioned matter, styled as a "Petition for Original Writ of Habeas Corpus."

STATEMENT

1. Petitioner Ali, who is known to the United States as Hassan Anvar, is a Chinese Uighur detained by the United States at the United States Naval Base at Guantanamo Bay, Cuba. On January 25, 2005, a Combatant Status Review Tribunal (CSRT) determined that petitioner "was properly designated an enemy combatant." App. Tab 4A.[1] On February 25, 2005, that deter-

[1] A CSRT convened on November 16, 2004, determined that petitioner was not properly designated as an enemy combatant. A CSRT decision is not final until reviewed by a legal advisor and approved by the CSRT director, who "may approve the decision * * * or return the record to the Tribunal for further proceedings." App. Tab 14 (CSRT Procedures, enclosure 1, § I(8)). In this case, the CSRT director returned the record for further proceedings. A second tribunal was convened on January 25, 2005, "to review additional classified evidence, unavailable to the previous Tribunal." App. Tab 4A. The second

mination became final. *Ibid.* The CSRT had before it evidence that, *inter alia*, petitioner "traveled to Afghanistan for weapon and tactics training," *id.* Tab 4A (enclosure 1, at 1); arrived at a "Tora Bora training camp * * * in September of 2001, where he received weapon training on the A-K rifle," *ibid.*; see *id.* Tab 4A (Exh. D-b at 2); "joined the Eastern Turkistan Islamic Movement, which is suspected of having received training and financial assistance from al-Qaida," *id.* Tab 4A (enclosure 1, at 1); and "provided a false name when captured," *ibid.*

2. In December 2005, petitioner, through counsel, filed a petition for a writ of habeas corpus in the United States District Court for the District of Columbia. See *Thabid* v. *Bush*, No. 1:05cv02398 (ESH) (AK) (D.D.C.) (05-2398) (App. Tab 3). On March 31, 2006, following the enactment of the Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, Tit. X, 119 Stat. 2739, the district court stayed petitioner's case without prejudice, observing that the DTA "raises serious questions concerning whether this Court retains jurisdiction." 05-2398 Order 2.

On October 17, 2006, the United States filed a factual return to petitioner's habeas petition. See App. Tab 4B (classified factual return). The return constituted the final record of proceedings before the CSRT pertaining to petitioner. See *ibid.*

Also on that day, the Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600, became

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tribunal concluded that petitioner was properly classified as an enemy combatant. That determination was reviewed by the legal advisor and approved by the CSRT director, and therefore constitutes the final CSRT decision.

law. Section 7(a) of the MCA amends 28 U.S.C. 2241 to provide that:

> No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

MCA § 7(a), 120 Stat. 2636 (to be codified at 28 U.S.C. 2241(e)(1) (2006)). Section 7(a) further provides that, except as authorized in the DTA:

> [N]o court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

Ibid. (to be codified at 28 U.S.C. 2241(e)(2) (2006)). The MCA expressly provides that the jurisdiction-altering amendments to Section 2241 "shall take effect on the date of the enactment of this Act," and that they "shall apply to all cases, without exception, pending on or after the date of the enactment of this Act, which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001." MCA § 7(b), 120 Stat. 2636 (to be codified at 28 U.S.C. 2441 note (2006)).

On November 22, 2006, petitioner moved to lift the stay issued by the district court. The district court de-

nied that r[illegible]est on December 6, 2006. App. Tab 2. The court explained that "[t]he D.C. Circuit will address [in *Boumediene* v. *Bush* and other cases] * * * the effect on district court jurisdiction over cases such as this one of the [DTA] and the [MCA]." *Id.* Tab 2, at 1. The court further explained that "for reasons of judicial economy and efficiency" it would "uphold the stay of proceedings in this case until the resolution of the fundamental jurisdictional questions surrounding the Guantanamo detainee cases." *Ibid.*

3. On February 13, 2007, petitioner filed in this Court a document entitled "Petition for Original Writ of Habeas Corpus." Petitioner contended (Pet. 14-15) that habeas review in the lower courts was "[l]ogjammed" because the District of Columbia Circuit had yet to issue its decision in *Boumediene* and asked "the Court to direct the District Court to lift its stay of his case and proceed to the merits of his petition." Pet. 3. Petitioner also asked this Court, "[p]ursuant to 28 U.S.C. § 2241(b), * * * [to] transfer Petitioner's application to the District Court for an immediate and expedited hearing and determination." Pet. 18-19.

One week after petitioner filed the instant petition, the purported "logjam" (Pet. 13, 14, 15) that was the premise for his extraordinary request to this Court was broken. On February 20, 2007, the District of Columbia Circuit decided *Boumediene* v. *Bush*, holding that the MCA eliminates federal court jurisdiction over petitions for habeas corpus filed by aliens detained as enemy combatants at Guantanamo Bay and does not violate the Suspension Clause. 476 F.3d 981 (2007). The *Boumediene* petitioners promptly sought review of that ruling in this Court. On April 2, 2007, this Court declined to grant certiorari to review that holding. 127 S. Ct. 1478.

On April 19, 2007, the United States asked the district court in this matter to lift the stay in order to dismiss the case for lack of jurisdiction. 05-2398 Resp. Mot. to Dismiss 1 n.1. The government explained:

> a number of the above-captioned cases were previously stayed or administratively closed by the Court pending resolution of the jurisdictional issues by the Court of Appeals. Now that the Court of Appeals has confirmed that the MCA withdraws habeas and other jurisdiction of the District Court in these cases, the stays or administrative closures of those cases should be lifted to address respondents' motion to dismiss.

Ibid.

On May 2, 2007, petitioner filed an opposition to the government's motion to dismiss and a motion for a stay. In particular, petitioner has asked the district court to "stay and abey" his habeas petition pending the exhaustion of his remedies in this Court and in the District of Columbia Circuit pursuant to the DTA. See 05-2398 Pet. Response and Opp. to Resp. Mot. to Dismiss and Pet. Mot. for Stay-and-Abey Order 1 (Pet. Mot. for Stay). The government has opposed that request. See Resp. Reply Mem. in Support of Mot. to Dismiss and Response in Connection with Related Motions 8-11 (filed May 14, 2007). The matter remains pending before the district court.

ARGUMENT

The petition for a writ of habeas corpus should be dismissed. The petition is premised on a purported "logjam" (Pet. 13, 14, 15) in the lower courts that no longer exists in the wake of the District of Columbia Circuit's decision in *Boumediene* v. *Bush*, 476 F.3d 981, cert. denied, 127 S. Ct. 1478 (2007), which was issued a

week after the instant petition was filed. In any event, the petition does not remotely meet the stringent standards that this Court applies in determining whether to grant the type of extraordinary relief requested.

To the extent that petitioner is seeking to invoke this Court's "original" habeas jurisdiction under 28 U.S.C. 2241, the request should be denied.[2] The MCA removes habeas jurisdiction over any claims challenging the detention of aliens, such as petitioner, detained as enemy combatants at Guantanamo Bay. See MCA § 7(a), 120 Stat. 2635. In any event, petitioner may obtain judicial review of his detention in the District of Columbia Circuit under the procedures established by Congress in the DTA. Because petitioner has not exhausted this available remedy, this Court should decline to consider an original habeas petition.

To the extent that petitioner seeks an order requiring the district court to act on his already-filed habeas petition, he is effectively seeking mandamus relief. Putting aside the jurisdictional problems with that request as well, an extraordinary writ is not warranted here because the District of Columbia Circuit issued its decision in *Boumediene*, and petitioner himself is now asking the district court to stay his habeas action "pending DTA exhaustion." 05-2398 Pet. Mot. for Stay 10.

Petitioner's motion for a *stay* in the district court pending "exhaustion of [his] DTA claims in the Court of Appeals" (05-2398 Pet. Mot. for Stay 9) underscores that the petition he filed in this Court seeking to "*lift*" (Pet. 3) (emphasis added) the district court's stay has been

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[2] While common usage calls petitions for habeas corpus filed directly in this Court "original" petitions, the Court's jurisdiction to consider such petitions, for purposes of Article III, is appellate. See *Felker* v. *Turpin*, 518 U.S. 651, 667 n.1 (1996) (Souter, J., concurring).

overtaken by events. While petitioner has not withdrawn this petition and apparently seeks a ruling from this Court that the DTA and the MCA have not removed jurisdiction over his habeas action, see 05-2398 Pet. Mot. for Stay 2-3, this Court has recently and repeatedly declined to review the jurisdictional question in *Boumediene*, and there is no reason for any different result with respect to the extraordinary petition here.

1. Petitioner's request (Pet. 18-19) that this Court exercise habeas jurisdiction and transfer the matter to the district court under Section 2241(b) for consideration should be denied.[3] Congress unequivocally removed this Court's Section 2241 habeas jurisdiction in enacting the DTA and MCA. As the District of Columbia Circuit held, the MCA "could not be clearer" in removing federal court jurisdiction over legal challenges by aliens detained as enemy combatants. *Boumediene*, 476 F.3d at 987; see MCA § 7(a), 120 Stat. 2635. This Court has declined multiple opportunities to review that holding. See *Boumedine* v. *Bush*, 127 S. Ct. 1478 (2007) (denying a writ of certiorari); 127 S. Ct. 1725, 1727 (2007) (Roberts, C.J., in chambers) (denying request by the *Boumediene* petitioners for an order suspending the

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[3] Petitioner does not appear to request that this Court consider whether he is properly detained as an enemy combatant, see Pet. 18-19 (requesting that this Court transfer his application to the district court for a hearing and determination whether he is an enemy combatant), and this Court has not issued an order requiring the government "to show cause why the petition for a writ of habeas corpus should not be granted." Sup. Ct. R. 20.4(b). Accordingly, this response does not address the underlying merits of his habeas petition. In any event, the record establishing petitioner's status as an enemy combatant, which would constitute the factual return under 28 U.S.C. 2243 and was submitted as such in the district court, is included in the appendix to the petition at Tab 4.

order denying a writ of certiorari because there was no "reasonable likelihood of this Court's reversing its previous position and granting certiorari") (internal quotation marks and citation omitted); *Hamdan* v. *Gates*, No. 06-1169 (Apr. 30, 2007) (declining to review petitions for a writ of certiorari filed by two other enemy combatant detainees); *Zalita* v. *Bush*, No. 06A1005 (May 1, 2007) (denying emergency application for injunction barring transfer of enemy combatant detainee). There is no reason to treat this petition any differently simply because it is styled as an original petition for habeas corpus.

Moreover, apart from Congress's removal of habeas jurisdiction under the MCA, petitioner has not met this Court's standard for obtaining a writ of habeas corpus. Before this Court will grant an original petition for habeas corpus, petitioner must show "that adequate relief cannot be obtained in any other form or from any other court." Sup. Ct. R. 20.4(a). Petitioner "must [also] show that exceptional circumstances warrant the exercise of the Court's discretionary powers." *Ibid.* Neither showing has been made here.

Petitioner has failed to show that the relief afforded him in the court of appeals under the DTA is inadequate. Indeed, petitioner has not even cited or addressed the judicial review provisions of the DTA. Instead, petitioner cites asserted problems with the CSRT process, but each of those allegations can be asserted under the judicial review afforded by the DTA. First, petitioner asserts that the "events that led to [P]etitioner Ali's reclassification as an enemy combatant" (after an initial CSRT concluded that he was not an enemy combatant) were somehow improper. Pet. 15. But this claim can be maintained in an action brought under the DTA. See DTA § 1005(e)(2)(C), 119 Stat. 2742 (the court of appeals

can review whether the "status determination * * * was consistent with the standards and procedures specified by the Secretary of Defense for [CSRTs]" and can review whether those procedures are "consistent with the Constitution and laws of the United States").

Second, petitioner argues that "CSRTs violated due process rights of prisoners." Pet. 15. To the extent petitioner has due process rights, this claim also can be maintained under the DTA. See DTA § 1005(e)(2)(C)(ii), 119 Stat. 2742 (the court of appeals can review "to the extent the Constitution and laws of the United States are applicable, whether the use of [CSRT] standards and procedures to make the [enemy combatant] determination is consistent with the Constitution and laws of the United States"). Finally, petitioner claims that he does not qualify as an enemy combatant under the definition of enemy combatant as expressed in "[a]t least six decades of United States * * * law." See Pet. 19-22. This claim may also be presented to the District of Columbia Circuit. See DTA § 1005(e)(2)(C)(ii), 119 Stat. 2742 (the court of appeals may evaluate whether "the [enemy combatant] determination is consistent with the * * * laws of the United States"). In sum, petitioner has not shown that review under the DTA is inadequate as required by this Court's Rule 20.4(a).

Petitioner's recent motion in the district court to *stay* his habeas action pending exhaustion of his DTA claims underscores that "exceptional circumstances warrant[ing] the exercise of the Court's discretionary powers" are entirely absent here. Sup. Ct. R. 20.4(a). The basis for his petition in this Court was that "each lower court has failed to act." Pet. 14. But the court of appeals' decision in *Boumediene*—and this Court's decision not to review it—have eliminated the central predicate for the

extraordinary relief he requests here. Petitioner is situated no differently than any of the other aliens detained at Guantanamo as enemy combatants and thus must exhaust his remedies under the DTA, a fact petitioner appears to have recognized in requesting a stay in the district court precisely for that purpose. See *Boumediene*, 127 S. Ct. at 1478 (statement of Stevens, J., and Kennedy, J., on denial of a writ of certiorari) ("[O]ur practice of requiring the exhaustion of available remedies as a precondition to accepting jurisdiction over applications for the writ of habeas corpus make it appropriate to deny these petitions at this time.") (citation omitted). The same reasoning applies with additional force here, where petitioner is seeking to invoke an original habeas remedy that is allowed only in "exceptional circumstances" and is "rarely granted." Sup. Ct. R. 20.4(a).[4]

2. By asking this Court to "direct the District Court to lift its stay of his case and proceed to the merits of his petition" (Pet. 3), petitioner is effectively seeking mandamus relief from this Court. See 28 U.S.C. 1651(a); *Will* v. *United States*, 389 U.S. 90, 95 (1967). That extraordinary request should be denied not only because this Court lacks jurisdiction under the MCA to consider "any other action" filed by an alien detained as an enemy combatant, see MCA § 7(a), 120 Stat. 2636 (to be

[4] The petition also fails to include several basic elements of a habeas petition or address why those elements are not required here. The petition does not "name * * * the person who has custody over him" (28 U.S.C. 2242). The petition also is not "signed and verified by the person for whose relief it is intended or by someone acting in his behalf" (*ibid.*), and petitioner does not explain why this requirement is met in some other fashion or should not be imposed in these circumstances. See Sup. Ct. R. 20.4(a) (A habeas petition "shall comply with the requirements of 28 U.S.C. §§ 2241 and 2242."). Those pleading defects provide an additional reason to dismiss this petition.

codified at 28 U.S.C. 2241(e)(2) (2006)), but also because the request has been overtaken by events—namely, the issuance of the District of Columbia Circuit's decision in *Boumediene* and this Court's refusal to review that decision. Indeed, petitioner himself is now seeking a *stay* in the district court pending his pursuit of DTA remedies in the court of appeals. See Pet. Mot. for Stay 9. The court of appeals, not this Court, is the appropriate forum for petitioner's challenge to his detention.

CONCLUSION

The petition for a writ of habeas corpus should be dismissed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

MAY 2007